

**KELLEY DRYE & WARREN LLP**

A LIMITED LIABILITY PARTNERSHIP

NEW YORK, NY  
WASHINGTON, DC  
CHICAGO, IL  
STAMFORD, CT

**200 KIMBALL DRIVE  
PARSIPPANY, NEW JERSEY 07054**

(973) 503-5900

FACSIMILE  
(973) 503-5950  
www.kelleydrye.com

BRUSSELS, BELGIUM

AFFILIATE OFFICES  
MUMBAI, INDIA

DIRECT LINE: (973) 503-5920

EMAIL: jboyle@kelleydrye.com

July 16, 2012

**VIA ECF**

Hon. Jose L. Linares, U.S.D.J.  
United States District Court for the  
District of New Jersey  
Martin Luther King, Jr. Federal Building  
50 Walnut Street, Room 2042  
Newark, New Jersey 07101

Re: *Larson, et al. v. AT&T Mobility LLC f/k/a  
Cingular Wireless LLC, et. al.*  
Civ. No.: 07-5325 (JLL)

Dear Judge Linares:

This firm represents the Sprint Defendants ("Sprint") in the above-referenced matter. This letter is in response to the July 12, 2012 letter from Scott A. Bursor. While we have no wish to engage in a letter-writing campaign prior to the August 1, 2012 hearing, to the extent the Court is inclined to consider Mr. Bursor's letter, I respectfully request that the Court consider this response as well, as Mr. Bursor's letter contains some factual inaccuracies.

Mr. Bursor's letter proceeds from the notion that the Third Circuit found that the current Settlement Class Representatives are inadequate. The Third Circuit did not make any such finding. The Third Circuit instead "suggest[ed] that the Court consider again whether the Class Representatives can adequately represent all class members" because the "objection was not made before the District Court with the clarity it has been pressed on" the Third Circuit. (Opinion, pp. 54, 60-61). The Third Circuit was clear in its holding, stating that "we will not opine on the District Court's conclusion that the Class Representatives can adequately represent all class members" and suggested the Court revisit the issue "because the case must be considered again on the notice issue." (*Id.*, p. 61). The Third Circuit did not even suggest a result of the remand. The Panel instead urged this Court to consider this issue "again in greater detail" as the Panel did not believe the Court was able to consider the issue in the first instance because of the lack of clarity in which the objection had been presented at final approval. (*Id.*) The assumption in Mr. Bursor's letter that it is a foregone conclusion that this Court will find the

**KELLEY DRYE & WARREN LLP**

Hon. Jose L. Linares, U.S.D.J.  
July 16, 2012  
Page Two

current Settlement Class Representatives inadequate is thus wrong, and it is respectfully submitted that no such finding is necessary. It is further respectfully submitted that, as the Third Circuit did not disturb the fairness finding by this Court, there is no reason to “negotiate a new settlement.”

It should also be noted that Mr. Bursor’s interjection of his status as class counsel in the “Zill Subscriber Class” and the “Nextel Class” is of no moment to the issues before the Court on remand. The Zill Subscriber Class was comprised of:

all persons who are parties to a Sprint customer agreement with a flat early termination fee for a personal cell phone account with a California area code and a California billing address.

(See Exhibit A).

These class members sought only injunctive relief. (See Exhibit B, p. 1) (The “current subscriber class is seeking only injunctive relief, with the result that class members cannot opt-out.”). As Sprint no longer charges flat rate ETFs (*Larson v. AT&T Mobility LLC*, \_\_\_\_ F.3d. \_\_\_\_ Slip. Op. at p. 13 n. 5), the claims of the Zill Subscriber Class are moot. While these subscribers may have claimed under the Larson settlement, they do not possess any current claim to enjoin collection of the non-existent flat rate ETFs.

As to the Nextel Class, the California Superior Court, Alameda County, confirmed that Larson representatives adequately represented the interests of the Nextel Class. (See Exhibit C, 7:2-4) (“This Court will not revisit the substance of the implicit decision in Larson that the plaintiffs in Larson adequately represented the persons on the Nextel iDen Network and thus the members of the California Nextel class.”)

The potential adequacy issue identified by the Third Circuit was with respect to Larson class members who were subject to a flat rate ETF at the time the Larson settlement was consummated. For the reasons set forth above and for other reasons, which could be the subject of briefing, if the Court so desires, this issue can be completely resolved without disturbing the Settlement Agreement. The claim period can be extended for those persons who claimed under the Larson Settlement because they were charged a flat rate ETF at any point in time until the last flat rate ETF contract term lapsed.

KELLEY DRYE & WARREN LLP

Hon. Jose L. Linares, U.S.D.J.  
July 16, 2012  
Page Three

Thank you for Your Honor's attention to this matter.

Respectfully submitted,

*s/ Joseph A. Boyle*

Joseph A. Boyle

JAB:mc  
Encls.

cc: All Counsel via ECF

# EXHIBIT A

12/12/2008 15:59 FAX 9259458792

BRAMSON PLUTZIK

068/073

1 Plaintiffs' motion for certification of the Subscriber Class in the early termination fee case  
 2 against defendants Sprint Spectrum, L.P., Wirelessco L.P. and Sprint PCS (collectively "Sprint") in  
 3 this coordinated proceeding came on regularly for hearing on June 1, 2006 in Department 22 of this  
 4 Court before the Honorable Ronald M. Sabraw. On June 9, 2006, the Court denied plaintiffs'  
 5 motion for certification of the Subscriber Class. Plaintiffs subsequently appealed the Court's order  
 6 and, on June 9, 2008, the Court of Appeal reversed the Court's order and held that the Court should  
 7 have certified the Subscriber Class.

8 NOW THEREFORE, the Court orders as follows:

9 1. Plaintiffs' motion for certification of the Subscriber Class in the Sprint early  
 10 termination fee case is GRANTED.

11 2. The Subscriber Class is defined as "all persons who are parties to a Sprint customer  
 12 agreement with a flat early termination fee for a personal cell phone account with a California area  
 13 code and a California billing address."

14 3. Pursuant to California Rule of Court 3.766(c), the Court will enter a separate order  
 15 regarding whether notice to class members is necessary, whether class members may exclude  
 16 themselves from the action, the time and manner of notice, the content of the notice and the parties  
 17 responsible for the cost of notice.

18 IT IS SO ORDERED.

19  
 20 Dated: December 19, 2008

*Winfred Y. Smith*  
 Judge Winfred Smith

21  
 22  
 23  
 24  
 25  
 26  
 27  
 28  
 29  
 30  
 31  
 32  
 33  
 34  
 35  
 36  
 37  
 38  
 39  
 40  
 41  
 42  
 43  
 44  
 45  
 46  
 47  
 48  
 49  
 50  
 51  
 52  
 53  
 54  
 55  
 56  
 57  
 58  
 59  
 60  
 61  
 62  
 63  
 64  
 65  
 66  
 67  
 68  
 69  
 70  
 71  
 72  
 73  
 74  
 75  
 76  
 77  
 78  
 79  
 80  
 81  
 82  
 83  
 84  
 85  
 86  
 87  
 88  
 89  
 90  
 91  
 92  
 93  
 94  
 95  
 96  
 97  
 98  
 99  
 100  
 101  
 102  
 103  
 104  
 105  
 106  
 107  
 108  
 109  
 110  
 111  
 112  
 113  
 114  
 115  
 116  
 117  
 118  
 119  
 120  
 121  
 122  
 123  
 124  
 125  
 126  
 127  
 128  
 129  
 130  
 131  
 132  
 133  
 134  
 135  
 136  
 137  
 138  
 139  
 140  
 141  
 142  
 143  
 144  
 145  
 146  
 147  
 148  
 149  
 150  
 151  
 152  
 153  
 154  
 155  
 156  
 157  
 158  
 159  
 160  
 161  
 162  
 163  
 164  
 165  
 166  
 167  
 168  
 169  
 170  
 171  
 172  
 173  
 174  
 175  
 176  
 177  
 178  
 179  
 180  
 181  
 182  
 183  
 184  
 185  
 186  
 187  
 188  
 189  
 190  
 191  
 192  
 193  
 194  
 195  
 196  
 197  
 198  
 199  
 200  
 201  
 202  
 203  
 204  
 205  
 206  
 207  
 208  
 209  
 210  
 211  
 212  
 213  
 214  
 215  
 216  
 217  
 218  
 219  
 220  
 221  
 222  
 223  
 224  
 225  
 226  
 227  
 228  
 229  
 230  
 231  
 232  
 233  
 234  
 235  
 236  
 237  
 238  
 239  
 240  
 241  
 242  
 243  
 244  
 245  
 246  
 247  
 248  
 249  
 250  
 251  
 252  
 253  
 254  
 255  
 256  
 257  
 258  
 259  
 260  
 261  
 262  
 263  
 264  
 265  
 266  
 267  
 268  
 269  
 270  
 271  
 272  
 273  
 274  
 275  
 276  
 277  
 278  
 279  
 280  
 281  
 282  
 283  
 284  
 285  
 286  
 287  
 288  
 289  
 290  
 291  
 292  
 293  
 294  
 295  
 296  
 297  
 298  
 299  
 300  
 301  
 302  
 303  
 304  
 305  
 306  
 307  
 308  
 309  
 310  
 311  
 312  
 313  
 314  
 315  
 316  
 317  
 318  
 319  
 320  
 321  
 322  
 323  
 324  
 325  
 326  
 327  
 328  
 329  
 330  
 331  
 332  
 333  
 334  
 335  
 336  
 337  
 338  
 339  
 340  
 341  
 342  
 343  
 344  
 345  
 346  
 347  
 348  
 349  
 350  
 351  
 352  
 353  
 354  
 355  
 356  
 357  
 358  
 359  
 360  
 361  
 362  
 363  
 364  
 365  
 366  
 367  
 368  
 369  
 370  
 371  
 372  
 373  
 374  
 375  
 376  
 377  
 378  
 379  
 380  
 381  
 382  
 383  
 384  
 385  
 386  
 387  
 388  
 389  
 390  
 391  
 392  
 393  
 394  
 395  
 396  
 397  
 398  
 399  
 400  
 401  
 402  
 403  
 404  
 405  
 406  
 407  
 408  
 409  
 410  
 411  
 412  
 413  
 414  
 415  
 416  
 417  
 418  
 419  
 420  
 421  
 422  
 423  
 424  
 425  
 426  
 427  
 428  
 429  
 430  
 431  
 432  
 433  
 434  
 435  
 436  
 437  
 438  
 439  
 440  
 441  
 442  
 443  
 444  
 445  
 446  
 447  
 448  
 449  
 450  
 451  
 452  
 453  
 454  
 455  
 456  
 457  
 458  
 459  
 460  
 461  
 462  
 463  
 464  
 465  
 466  
 467  
 468  
 469  
 470  
 471  
 472  
 473  
 474  
 475  
 476  
 477  
 478  
 479  
 480  
 481  
 482  
 483  
 484  
 485  
 486  
 487  
 488  
 489  
 490  
 491  
 492  
 493  
 494  
 495  
 496  
 497  
 498  
 499  
 500  
 501  
 502  
 503  
 504  
 505  
 506  
 507  
 508  
 509  
 510  
 511  
 512  
 513  
 514  
 515  
 516  
 517  
 518  
 519  
 520  
 521  
 522  
 523  
 524  
 525  
 526  
 527  
 528  
 529  
 530  
 531  
 532  
 533  
 534  
 535  
 536  
 537  
 538  
 539  
 540  
 541  
 542  
 543  
 544  
 545  
 546  
 547  
 548  
 549  
 550  
 551  
 552  
 553  
 554  
 555  
 556  
 557  
 558  
 559  
 560  
 561  
 562  
 563  
 564  
 565  
 566  
 567  
 568  
 569  
 570  
 571  
 572  
 573  
 574  
 575  
 576  
 577  
 578  
 579  
 580  
 581  
 582  
 583  
 584  
 585  
 586  
 587  
 588  
 589  
 590  
 591  
 592  
 593  
 594  
 595  
 596  
 597  
 598  
 599  
 600  
 601  
 602  
 603  
 604  
 605  
 606  
 607  
 608  
 609  
 610  
 611  
 612  
 613  
 614  
 615  
 616  
 617  
 618  
 619  
 620  
 621  
 622  
 623  
 624  
 625  
 626  
 627  
 628  
 629  
 630  
 631  
 632  
 633  
 634  
 635  
 636  
 637  
 638  
 639  
 640  
 641  
 642  
 643  
 644  
 645  
 646  
 647  
 648  
 649  
 650  
 651  
 652  
 653  
 654  
 655  
 656  
 657  
 658  
 659  
 660  
 661  
 662  
 663  
 664  
 665  
 666  
 667  
 668  
 669  
 670  
 671  
 672  
 673  
 674  
 675  
 676  
 677  
 678  
 679  
 680  
 681  
 682  
 683  
 684  
 685  
 686  
 687  
 688  
 689  
 690  
 691  
 692  
 693  
 694  
 695  
 696  
 697  
 698  
 699  
 700  
 701  
 702  
 703  
 704  
 705  
 706  
 707  
 708  
 709  
 710  
 711  
 712  
 713  
 714  
 715  
 716  
 717  
 718  
 719  
 720  
 721  
 722  
 723  
 724  
 725  
 726  
 727  
 728  
 729  
 730  
 731  
 732  
 733  
 734  
 735  
 736  
 737  
 738  
 739  
 740  
 741  
 742  
 743  
 744  
 745  
 746  
 747  
 748  
 749  
 750  
 751  
 752  
 753  
 754  
 755  
 756  
 757  
 758  
 759  
 760  
 761  
 762  
 763  
 764  
 765  
 766  
 767  
 768  
 769  
 770  
 771  
 772  
 773  
 774  
 775  
 776  
 777  
 778  
 779  
 780  
 781  
 782  
 783  
 784  
 785  
 786  
 787  
 788  
 789  
 790  
 791  
 792  
 793  
 794  
 795  
 796  
 797  
 798  
 799  
 800  
 801  
 802  
 803  
 804  
 805  
 806  
 807  
 808  
 809  
 810  
 811  
 812  
 813  
 814  
 815  
 816  
 817  
 818  
 819  
 820  
 821  
 822  
 823  
 824  
 825  
 826  
 827  
 828  
 829  
 830  
 831  
 832  
 833  
 834  
 835  
 836  
 837  
 838  
 839  
 840  
 841  
 842  
 843  
 844  
 845  
 846  
 847  
 848  
 849  
 850  
 851  
 852  
 853  
 854  
 855  
 856  
 857  
 858  
 859  
 860  
 861  
 862  
 863  
 864  
 865  
 866  
 867  
 868  
 869  
 870  
 871  
 872  
 873  
 874  
 875  
 876  
 877  
 878  
 879  
 880  
 881  
 882  
 883  
 884  
 885  
 886  
 887  
 888  
 889  
 890  
 891  
 892  
 893  
 894  
 895  
 896  
 897  
 898  
 899  
 900  
 901  
 902  
 903  
 904  
 905  
 906  
 907  
 908  
 909  
 910  
 911  
 912  
 913  
 914  
 915  
 916  
 917  
 918  
 919  
 920  
 921  
 922  
 923  
 924  
 925  
 926  
 927  
 928  
 929  
 930  
 931  
 932  
 933  
 934  
 935  
 936  
 937  
 938  
 939  
 940  
 941  
 942  
 943  
 944  
 945  
 946  
 947  
 948  
 949  
 950  
 951  
 952  
 953  
 954  
 955  
 956  
 957  
 958  
 959  
 960  
 961  
 962  
 963  
 964  
 965  
 966  
 967  
 968  
 969  
 970  
 971  
 972  
 973  
 974  
 975  
 976  
 977  
 978  
 979  
 980  
 981  
 982  
 983  
 984  
 985  
 986  
 987  
 988  
 989  
 990  
 991  
 992  
 993  
 994  
 995  
 996  
 997  
 998  
 999  
 1000

PROPOSED ORDER GRANTING PLAINTIFFS' MOTION FOR CERTIFICATION OF  
 SUBSCRIBER CLASS  
 56717

2

# **EXHIBIT B**



SUPERIOR COURT OF CALIFORNIA  
COUNTY OF ALAMEDA

**FILED**  
ALAMEDA COUNTY

NOV 14 2008

CLERK OF THE SUPERIOR COURT

By A. J. [Signature] Deputy

In re: CELLPHONE TERMINATION  
FEE CASES

) J.C.C.P. 4332

) ORDER REGARDING NOTICE TO  
) SPRINT CURRENT SUBSCRIBER ETF  
) CLASS.

) Date: November 14, 2008  
) Time: 9:00 am  
) Dept.: 23

The Court held a Case Management Conference on March 13, 2008. Counsel appeared on behalf of Plaintiffs and on behalf of Defendants. After consideration of the statements of the parties and the discussion at the Case Management Conference, IT IS ORDERED:

The Court will enter a separate order stating that the Plaintiffs in the Sprint/Nextel ETF cases may prosecute the claims in that complaint on behalf of a "current subscriber" class as defined in that order.

The Court finds that class notice is appropriate at this time. Minimal notice is required because (1) notice was already provided to "payor" class and (2) the "current subscriber" class is seeking only injunctive relief, with the result that class members cannot opt-out. The Court finds that the content of Plaintiffs' proposed notice is


1 adequate and orders Plaintiffs to post their proposed notice on the existing website  
2 concerning the Sprint ETF case. Plaintiffs will pay all costs of this notice.

3 The parties may meet and confer and suggest Court approved updates to the  
4 website following the Statement of Decision on the claims of the Sprint payor class as the  
5 case progresses. Alternatively, the Court will entertain motions for supplemental notice  
6 to keep the class informed of events as the case progresses.  
7

8

9

10 Dated: November 14, 2008

  
Judge Winifred Smith

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27



# **EXHIBIT C**

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF ALAMEDA

In re: CELLPHONE TERMINATION  
FEE CASES

) J.C.C.P. 4332  
)  
) ORDER (1) DENYING MOTION OF  
) SPRINT TO DISMISS KATHERINE  
) ZILL; (2) GRANTING MOTION OF  
) SPRINT TO DISMISS MEMBERS OF  
) THE SUBSCRIBER AND NEXTEL ETF  
) CASES WHO DID NOT OPT OUT OF  
) THE LARSON SETTLEMENT; (3)  
) DENYING MOTION OF PLAINTIFF  
) ZILL FOR TRO; AND (4) ADDRESSING  
) CMC ISSUES.

Date: March 5, 2010  
Time: 9:30 am  
Dept.: 23

\_\_\_\_\_)  
The motion of Sprint to dismiss, the motion to Katherine Zill for a temporary  
restraining order, and a CMC came on for hearing on March 5, 2009, in Department 23 of  
this Court, the Honorable Winifred Smith presiding. After consideration of the briefing  
and the argument, IT IS ORDERED:

**MOTION OF SPRINT TO DISMISS THE SPRINT SUBSCRIBER AND NEXTEL  
ETF CASES.**

The motion of Sprint to dismiss the Sprint Subscriber component of *Ayyad v.*  
*Sprint* and all components of *Robinson v. Nextel* based on the res judicata (claim

preclusion) effect of *Larson v. Sprint Nextel Corporation*, No. 07-05325 (JLL) (D.N.J.) is

GRANTED IN PART.(fn1)

General principles. The cases concerning the res judicata effect of a prior class action settlement fall into two categories - those concerning issues that were and those that were not considered and determined in the prior proceeding.

Regarding issues that were considered and determined in the prior proceeding, California case law is somewhat unclear about the nature and scope of a permissible collateral attack on a prior class action settlement. *Janik v. Rudy, Exelrod & Zieff* (2004) 119 Cal.App.4th 930, 944 fn 3. There is certainly a split in authority at the federal level. *Epstein v. MCA, Inc.* (9<sup>th</sup> Cir., 1999) 179 F.3d 641, holds that a second court should engage only in a "limited collateral" inquiry into the procedural aspects of the first court's order whereas *Stephenson v. Dow Chemical* (3<sup>rd</sup> Cir., 2001) 273 F.3d 249, holds that a second court can engage in a broad collateral review of the settlement court's substantive findings. The analysis has also divided the supreme courts of various states. Compare *Simmermon v. Dryvit Systems, Inc.* (N.J. Supr. 2008) 953 A.2d 478, 487 fn 9 (adopting *Epstein*); *Lamarque v. Fairbanks Capital Corp.* (R.I. Supr., 2007) 927 A.2d 753, 760-765 (adopting *Epstein*); *Hospitality Management Associates, Inc. v. Shell Oil Co.* (S.C. Supr., 2005) 591 S.E. 2d 611, 653-660 (adopting *Epstein*) with *Wilkes ex rel. Mason v. Phoenix Home Life Mut. Ins. Co.* (Pa. Supr., 2006) 902 A.2d 366, 370-383 (adopting *Stephenson*); *State v. Homeside Lending, Inc.* (Vt. Supr., 2003) 826 A.2d 997, 1016-1017 (adopting *Stephenson*).

---

<sup>1</sup> *Johnson v. GlaxoSmithKline, Inc.* (2005) 166 Cal.App.4th 1497, 1507 fn 5 (noting distinction between California and federal terminology).

1 *Martorana v. Marlin & Saltzman* (2009) 175 Cal.App.4th 685, 696-697, post-  
2 dates the identification of the *Epstein /Stephenson* split in *Janik*, 119 Cal.App.4th at 944  
3 fn 3, but does not address the issue directly. *Martorana* does, however, strongly suggest  
4 that California follows the *Epstein* approach. *Martorana* quotes *Janik* for the proposition  
5 that “[i]f the issue on which a malpractice complaint is based has been considered and  
6 determined in the class action proceedings, the rulings of the class action court will be  
7 binding on members of the class and preclude reconsideration of those matters in another  
8 forum” and then concludes, “*Martorana* had a full and fair opportunity to object to the  
9 settlement notice in the [first case] before it was approved by the trial court.” *Id.* at 696  
10 and 696-697. Based on analysis implicit in *Martorana* and the analysis explicit in  
11 *Epstein* and the state courts that follow *Epstein*, this Court concludes that California  
12 follows, or would follow, the *Epstein* approach that where a first court has considered an  
13 issue then a second court should engage only in a “limited collateral” inquiry into the  
14 procedural aspects of the first court’s order.  
15

16  
17 Regarding issues that were not considered and determined in the prior proceeding,  
18 those issues can be the basis for a collateral attack on the substantive aspects of the  
19 decision in the first case. *Janik*, 119 Cal.App.4th at 930, 944 fn 3. In addition, a Court  
20 granting final approval of a class action settlement cannot determine how the claim  
21 preclusion effect of that judgment will apply to any subsequent case. That can only be  
22 tested in a second action when claim preclusion is presented as a defense. Order of  
23 12/26/05 (Effect of *In re Wireless Tel. Servs. Antitrust Litig.* (S.D.N.Y., 2005) 385 F.  
24 Supp. 2d 403, on Sprint handset locking claims) and Order of 6/9/06 (effect of *Campbell*  
25 *v. AirTouch Cellular* (2006) 2006 WL 754005, on Verizon handset locking claims).  
26  
27

1       Opt-outs from the *Larson* settlement. Persons who opted out of the proposed  
 2       *Larson* settlement were not included in the final *Larson* settlement, cannot obtain the  
 3       benefits of the settlement, and are not bound by the settlement.

4       Katherine Zill, the class representative in the California Sprint Subscriber case,  
 5       opted out of the *Larson* settlement. At the hearing on March 5, 2010, counsel for  
 6       Plaintiffs provided the Court with Ms. Zill's opt out letter and Sprint offered to provide a  
 7       declaration that Ms. Zill opted out. The Court considers this as a stipulated fact. Ms. Zill  
 8       is not subject to the *Larson* settlement and the *Larson* settlement has no res judicata  
 9       effect on her personally.(fn2)

11       The absent members of the California Sprint Subscriber case did not collectively  
 12       opt out of the *Larson* settlement. Although Ms. Zill opted out of the *Larson* settlement as  
 13       an individual, she could not opt out of the *Larson* settlement on behalf of the entire  
 14       California Sprint Subscriber class. *Hanlon v. Chrysler Corp.* (9<sup>th</sup> Cir., 1998) 150 F.3d  
 15       1011, 1024, addresses this directly and states:

17       The right to participate, or to opt-out, is an individual one and should not  
 18       be made by the class representative or the class counsel. ... There is no  
 19       class action rule, statute, or case that allows a putative class plaintiff or  
 20       counsel to exercise class rights en masse, either by making a class-wide  
 21       objection or by attempting to effect a group-wide exclusion from an  
 22       existing class. Indeed, to do so would infringe on the due process rights of  
 23       the individual class members, who have the right to intelligently and  
 24       individually choose whether to continue in a suit as class members.

25       See also *In re Prudential Ins. Co. America Sales Practice Litigation* (3<sup>rd</sup> Cir., 1998) 148  
 26       F.3d 283, 295, fn 14; *In re Lease Oil Antitrust Litigation (No. II)* (S.D. Tex.,1999) 186  
 27       F.R.D. 403, 439; *Sloan v. Winn Dixie Raleigh, Inc.* (4<sup>th</sup>, Cir., 2002) 25 Fed. Appx. 197.

1 The members of the California Sprint Subscriber class are subject to the terms of the  
 2 *Larson* settlement unless they individually opted out of the settlement.

3 Ms. Zill's opt-out of the *Larson* settlement does not affect her ability to represent  
 4 the California class in this motion. This Court designated Ms. Zill as class representative  
 5 in this California class action and that has not changed. What is at issue in this motion is  
 6 whether the absent class members in this California case implicitly abandoned Ms. Zill  
 7 and chose to participate in the *Larson* settlement when, following *Larson*'s allegedly  
 8 deficient approval, notice, and opt-out procedure, they took no action and thereby elected  
 9 to remain in the *Larson* settlement. Until the Court determines the validity of *Larson*'s  
 10 approval, notice, and opt-out procedure, the Court presumes that the absent class  
 11 members in this California case have not abandoned Ms. Zill.  
 12

13  
 14 Scope of *Larson* settlement. There is a final judgment in *Larson*. Sprint Oppo.  
 15 Filed 2/22/10, Exh A. The *Larson* settlement includes and resolves the claims of the non-  
 16 opting out members of the Sprint Subscriber class and the Nextel Payer class. *Larson*  
 17 Opinion at 8 fn 7 and 14 fn 11.  
 18

19 Adequacy of Representation - Sprint Subscriber class. Plaintiffs assert that the  
 20 Plaintiffs in *Larson* did not adequately represent the members of the Sprint Subscriber  
 21 class. The Opinion in *Larson* expressly addressed this issue. *Larson* Opinion at 7-8.  
 22 Under the principles of collateral estoppel in *Martorana* and *Epstein* this court will not  
 23 revisit those issues.  
 24

25  
 26  
 27

---

 2 The Court is frustrated and disappointed that the moving, opposition, and reply papers of the parties did not inform the Court that Ms. Zill had opted out of the *Larson* settlement. The issues were joined at the hearing, but the hearing was focused on issues that had not been briefed.

1        Adequacy of Representation - Nextel Payer class. Plaintiffs assert that the  
2 Plaintiffs in *Larson* did not adequately represent the members of the California Nextel  
3 class because none of the *Larson* plaintiffs had subscribed to or paid an ETF to Nextel  
4 and the original *Larson* complaint did not assert a claim against Nextel. The Opinion in  
5 *Larson* did not expressly address these issues. Following *Martorana* and *Epstein*, this  
6 court examines whether the members of the Nextel Payer class had a full and fair  
7 opportunity to raise the issues in the context of the *Larson* settlement.  
8

9        The *Larson* Opinion states that the Galleguillos Objectors were represented by the  
10 Bursor Group, that the Galleguillos Objectors objected to the original plan of notice, and  
11 that the settlement was specifically revised to provide notice to the members of the class  
12 in *Robertson v. Nextel*. *Larson* Opinion at 16, 37 fn 29, 56-57. This suggests that the  
13 Galleguillos Objectors either were Nextel iDen consumers or were asserting the interests  
14 of Nextel iDen consumers. The Galleguillos Objectors raised objections as the adequacy  
15 of the *Larson* class representatives, although it appears that the objections were focused  
16 on the adequacy to represent Sprint customers rather than to represent Nextel iDen  
17 customers. *Larson* Opinion at 7-8 and 25 fn 23. Finally, counsel for the California  
18 Nextel class in *Robertson v. Nextel* sought and obtained fees in *Larson* for their  
19 contribution in *Robertson* to the *Larson* settlement, again suggesting that the members of  
20 the California Nextel class were represented in the *Larson* settlement. *Larson* Opinion at  
21 64-65.  
22

23        The Court concludes that the members of the California Nextel class had a full  
24 and fair opportunity to raise their concerns with adequacy of representation in the *Larson*  
25 settlement both individually due the supplemental notice provided to the Nextel class and  
26  
27

1 derivatively through the arguments actually made by the Galleguillos Objectors.

2 Following *Martorana* and *Epstein*, this Court will not revisit the substance of the implicit  
3 decision in *Larson* that the Plaintiffs in *Larson* adequately represented the persons on the  
4 Nextel iDen network and thus the members of the California Nextel class.

5 This Court does not address the substantive issues of whether after the merger of  
6 Sprint and Nextel the pre-merger claims against Sprint and Nextel had an “identical  
7 factual predicate” and whether the Sprint customers in *Larson* provided “adequacy of  
8 representation” to the pre-merger iDen Nextel consumers. *Wal-Mart Stores, Inc. v. Visa*  
9 *U.S.A., Inc.* (2<sup>nd</sup> Cir., 2005) 396 F.3d 96, 106.

11 Notice in *Larson* - interference with attorney-client relationship. This court  
12 certified the Sprint Subscriber class and the Nextel Payer class in June 2006. Orders of  
13 6/9/06 and 4/18/08. As a result, there was an attorney-client relationship between class  
14 counsel and the members of the Sprint Subscriber class and the Nextel Payer class after  
15 June 2006. *Hernandez v. Vitamin Shoppe Industries, Inc.* (2009) 174 Cal.App.4th 1441,  
16 1459-1461. Under California Rule of Professional Conduct 2-100(A) counsel for Sprint  
17 and Nextel were precluded from communicating directly or indirectly with the class  
18 members about the subject of the lawsuit. The class notice in *Larson* was, however,  
19 approved by and sent at the direction of the federal judge and therefore was not a  
20 violation of Rule 2-100(A).

23 Notice in *Larson* - adequacy. Plaintiffs assert that the class notice in *Larson* was  
24 not adequate. The Opinion in *Larson* expressly addressed this issue. *Larson* Opinion at  
25 9-23. Under the principles of collateral estoppel in *Martorana* and *Epstein* this court will  
26 not revisit those issues.  
27



1        Remedy. This order in no way precludes the members of the Sprint Subscriber  
 2 class and the Nextel Payer class from raising their concerns with the procedure and  
 3 substance of the *Larson* settlement by appealing from the judgment in that case. Their  
 4 remedy, however, is with the United States Court of Appeal for the Third Circuit and is  
 5 not with this court.  
 6  
 7

8        **MOTION OF PLAINTIFFS FOR TEMPORARY RESTRAINING ORDER.**

9        The motion of Plaintiff Zill in her individual capacity for a temporary restraining  
 10 order is DENIED. The Court considers the probability of success on the merits and the  
 11 threat of immediate irreparable harm. C.C.P. § 526(a); *Pacific Decision Sciences Corp.*  
 12 *v. Superior Court* (2004) 121 Cal.App.4th 1100, 1110; *Korean Philadelphia Presbyterian*  
 13 *Church v. California Presbytery* (2000) 77 Cal.App.4th 1069, 1084.  
 14

15        Plaintiff Zill's motion is unclear whether she has paid a flat rate ETF or is a  
 16 current subscriber and might pay a flat rate ETF in the future. Ms. Zill did not file a  
 17 declaration in support of her motion. At the hearing, Sprint stated that Ms. Zill is a  
 18 current subscriber and is subject to a pro-rated ETF.  
 19

20        Ms. Zill has not demonstrated a probability of success on the merits. Ms. Zill has,  
 21 through the *Ayyad* Sprint Payor class trial, demonstrated a probability of success in  
 22 proving that Sprint's flat rate ETF was an unlawful liquidated damages provision under  
 23 Civil Code § 1671(d). *Ayyad* Statement of Decision filed 12/4/08. Ms. Zill has not,  
 24 however, demonstrated a probability of success on Sprint's related cross-claim for breach  
 25 of contract and collection of its actual damages. *Garrett v. Coast & Southern Fed. Sav.*  
 26 *& Loan Assn.* (1973) 9 Cal.3d 731, 741. There is a reasonable possibility that Ms. Zill  
 27

1 might prevail on her unlawful liquidated damages claim, lose the cross-claim for breach  
2 of contract, and end up owing money to Sprint.

3 Ms. Zill has not demonstrated a threat of immediate irreparable harm. If Ms. Zill  
4 has already paid a flat rate ETF, then she has a claim for money damages. Ms. Zill has  
5 not provided any evidence that she has a flat ETF or that she plans to terminate her  
6 contract in the near future. Even assuming that Ms. Zill planned to terminate her contract  
7 in the near future, the Court would not be inclined to issue a TRO to avoid the  
8 complications related to the potentially unlawful imposition of a single ETF on a single  
9 consumer.  
10

11 The motion of Plaintiff Zill in her capacity as class representative for the  
12 California Sprint Subscriber class and/or the Nextel class (*Robertson v. Nextel*) for a  
13 temporary restraining order is DENIED. The *Larson* settlement includes and resolves the  
14 claims of the non-opting out members of the Sprint Subscriber class and the Nextel Payer  
15 class. *Larson* Opinion at 8 fn 7 and 14 fn 11.  
16

17 The request of Sprint for sanctions is DENIED. The Court does not consider  
18 whether any actions in this court might be a violation of an injunction in the *Larson* case.  
19 Injunctions issued by the federal court should be enforced by the federal court.  
20

21  
22 **CMC ISSUES.**

23 **ETF EXECUTIVE COMMITTEE.**

24 The Court established an ETF Executive Committee to manage the ETF cases in this  
25 coordinated proceeding. Orders of 1/28/04, 2/10/04, 6/29/05, 10/11/05, 4/2/09, 8/24/09. The  
26  
27

1 Committee is a deliberative entity and not just a structure for determining who gets to vote and  
2 how many votes is a majority. The Order of 2/10/04 states at para 2(a):

3       Decisions by Executive Committee. (a) The Executive Committee will  
4       function in a manner similar to that of a board of directors. The Executive  
5       Committee must be informed and must deliberate before making  
6       decisions. All decisions of the Executive Committee will be by majority  
7       vote.

8       The Committee must give notice of a meeting to all of its members. A Committee can make a  
9       decision without a meeting only if all members consent to that procedure. Cal. Corp. § 307(a)(3)  
10       and (b); 8 Del. Code § 141(f).

11       If members of the Committee think they have been improperly excluded from the  
12       Committee's processes then they can seek relief from the Court. If members of the Committee  
13       think that new facts warrant a review of the composition of the Committee then they can bring  
14       those facts to the Court's attention. The Court directs the members of the Committee to have a  
15       meeting of all members to address these issues before any member seeks relief from the Court  
16       related to the Committee's internal matters.

17       **AWS/CINGULAR.**

18       ETF. There has been a nationwide settlement in *Hall v. AT&T Mobility* in federal court  
19       in New Jersey. The motion for final approval is set for 4/14/10. (Cingular CMC Stmt filed  
20       11/9/09, Exh A.) This Court has stayed the AWS/Cingular ETF cases pending resolution of the  
21       motion in *Hall* for final approval. Order of 10/19/09 at 5:16-7:15.

22       HANDSET LOCKING. This Court has preliminarily approved a nationwide  
23       settlement. The motion for final approval is set for 7/2/10.

24       **T-MOBILE.**

25       ETF. Case completed.  
26  
27

HANDSET LOCKING. Case completed.

**SPRINT/NEXTEL.**

ETF – Sprint Payer class. The claims in *Ayyad* are expressly excluded from the nationwide class settlement in *Larson*. Trial court proceedings have concluded and several appeals are pending. No change from CMC Order of 3/24/09.

The Court of Appeal has issued a remittitur in *Ayyad v. Sprint*, A121948, which concerns the sealing of documents and states Sprint shall pay Plaintiffs' costs on appeal. The Court ORDERS Sprint to identify any documents that were under seal pending resolution of the appeal and to re-file the documents in public format on or before 3/26/10.

ETF – Sprint subscriber class. Claims of non-opting out members of the class dismissed per above order. Case completed.

ETF – Nextel payer class. Claims of non-opting out members of the class dismissed per above order. Case completed.

ETF – Ms. Zill. Ms. Zill has an individual claim regarding her Sprint ETF. The Court directs the parties to meet and confer regarding the resolution of Ms. Zill's individual case. The Court gives NOTICE of its own motion (1) to clarify that Ms. Zill's individual claim is the only claim remaining in the Sprint Subscriber case and (2) to reclassify what is now Ms. Zill's individual case as appropriate for resolution in small claims court. C.C.P. § 403.040. See generally Weil & Brown, *Cal. Practice Guide: Civil Procedure Before Trial* (The Rutter Group 2009) § 3:112 et seq. The Court's motion will be heard at the CMC on 4/2/10. This does not preclude Plaintiff Zill and/or Sprint from filing motions to propose other procedures for resolving Ms. Zill's case and/or any remaining aspects of the Sprint Subscriber case.